No. 17-419

IN THE

# Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

*Petitioners*,

v.

DALE W. STEAGER,
State Tax Commissioner of West Virginia,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

## BRIEF FOR THE PETITIONERS


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## QUESTION PRESENTED

Whether the doctrine of intergovernmental tax immunity, as codified by 4 U.S.C. § 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of retired state law enforcement officers without providing the same exemption for retired employees of the U.S. Marshals Service.

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## INTRODUCTION

The State of West Virginia provides a complete tax exemption for *state* law enforcement retirees' income from certain state retirement plans. But it denies that favorable tax treatment to *federal* law enforcement retirees like Petitioner James Dawson, a retired U.S. Marshal.

In *Davis v. Michigan Department of Treasury*, this Court held that such discriminatory tax treatment violates the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111, which codifies the doctrine. 489 U.S. 803 (1989). Under *Davis*, "[t]he imposition of a heavier tax burden on [federal retirees] than is imposed on [state retirees] must be justified by significant differences between the two classes." *Id.* at 815-16 (quoting *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)).

In this case, there is no doubt that West Virginia imposes a "heavier tax burden" on federal law enforcement retirees like Dawson than on the favored state retirees. And "[i]t is undisputed ... that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers" who receive the exemption. Pet.App.22a.

Nonetheless, the West Virginia Supreme Court of Appeals upheld the discriminatory tax scheme without identifying any "significant difference" between federal law enforcement retirees like Dawson and the state retirees. It did so by purportedly distinguishing *Davis* on the ground that the law at issue there "afforded a blanket exemption to *all* state retirees," whereas the law challenged here "exempts a

*narrow* class of state employees." Pet.App.10a (quoting *Brown v. Mierke*, 443 S.E.2d 462, 466 (W.Va. 1994)). But nothing in *Davis* supports the notion that § 111 allows a state to discriminate in favor of *some* of its retirees so long as it does not discriminate in favor of *all* of them.

The court below went on to apply a test of its own devising that bears no resemblance to the bright-line rule laid out by *Davis*. Under the state court's test, "[c]hallenges to a state tax scheme under 4 U.S.C. § 111 can succeed only when one *purpose* of the challenged scheme is shown to discriminate against the officer or employee because of the source of pay." Pet.App.11a (quoting *Brown*, 443 S.E.2d at 463) (emphasis altered). And the "intent of the scheme" is ascertained from "the totality of the circumstances." *Id.* (quoting *Brown*, 443 S.E.2d at 463).

According to the court below, three such "circumstances" demonstrate the absence of discriminatory intent in this case. First, federal retirees are treated slightly better than *private-sector* retirees—a comparison that *Davis* expressly held to be irrelevant, 489 U.S. at 815 n.4. Second, federal law enforcement retirees are treated the same as state retirees who did *not* work in law enforcement—another reference to the lower court's erroneous distinction between "blanket" and "narrow" discrimination. Finally, "an unknown number of ... deputy sheriffs" receive their pensions from the general state employee pension plan rather than the law enforcement plans that benefit from the full exemption, meaning that those retired deputies are also treated the same as federal retirees. Pet.App.13a. For these reasons, the court concluded that the

exemption "gives a benefit to a very narrow class of former state and local employees, and that benefit was not intended to discriminate against former federal marshals." Pet.App.16a.

But those considerations are all irrelevant under *Davis*, which held that the intent behind a discriminatory tax scheme is "wholly beside the point, ... for it does nothing to demonstrate that there are 'significant differences between the two classes.'" 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383). And under the straightforward two-part test of *Davis*, the exemption at issue here violates § 111. First, it undoubtedly imposes a heavier tax burden on federal law enforcement retirees than on state law enforcement retirees. Second, no "significant differences between the two classes" justify the discrimination—indeed, the state court did not even purport to identify such a difference. Under *Davis*, the analysis ends there.

This Court should reverse.

## OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (Pet.App.1a) is unreported, but it is available at 2017 WL 2172006. The opinion of the Circuit Court of Mercer County (Pet.App.17a) is unreported.

## JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on May 17, 2017. On August 9, 2017, the Chief Justice extended the time to file a petition for a writ of certiorari until September 9, 2017. On August 29, 2017, the Chief Justice further extended the time to file until September 19, 2017. The petition

was filed on that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

4 U.S.C. § 111(a) provides:

> **(a) General rule.**—The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

W. Va. Code § 11-21-12(c)(6) provides:

> (c) *Modifications reducing federal adjusted gross income.*—There shall be subtracted from federal adjusted gross income to the extent included therein:
>
> * * *
>
> (6) Retirement income received in the form of pensions and annuities after December 31, 1979, under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes.

## STATEMENT

The doctrine of intergovernmental tax immunity dates back to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.). In *McCulloch*, this Court struck down a discriminatory Maryland law that taxed the federally chartered Bank of the United States while exempting "all Banks ... chartered by the [Maryland] Legislature." *Id.* at 320.

The tax immunity doctrine "has been generally codified at 4 U.S.C. § 111." *Reich v. Collins*, 513 U.S. 106, 108 (1994). That statute says that a state tax on the pay of a federal employee must not "discriminate against the ... employee because of the source of the pay." 4 U.S.C. § 111(a).

In *Davis*, this Court held that § 111 applies to federal retirement benefits as well as to current employees' pay. 489 U.S. at 808-10.

### A. Factual Background

Petitioner James Dawson is a retired federal law enforcement officer. Pet.App.4a, 18a. He served for most of his career as a deputy U.S. Marshal and was ultimately appointed U.S. Marshal for the Southern District of West Virginia. Pet.App.4a. Dawson retired from the U.S. Marshals Service in 2008. *Id.* As a result of his federal service, he receives retirement income from the Federal Employees Retirement System. *Id.*

The State taxes Dawson's retirement income and the income of other federal retirees. Pet.App.2a. By contrast, it provides a complete tax exemption for the income that retired *state* law enforcement officers receive from specified state retirement plans. Pet.App.3a; *see* W. Va. Code § 11-21-12(c)(6)

(exempting "[r]etirement income ... under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System").

Because federal law prohibits the State from discriminating based on the federal source of retirement income, Dawson and his wife claimed an exemption under § 12(c)(6). Pet.App.4a. The State Tax Commissioner denied their claim, and the West Virginia Office of Tax Appeals affirmed. Pet.App.4a-5a.

The Dawsons sought judicial review.

**B. Proceedings Below**

1. The Circuit Court of Mercer County reversed. Pet.App.17a-25a. Applying this Court's decision in *Davis*, it held that the State had violated § 111 and the tax immunity doctrine by taxing federal law enforcement retirees more heavily than state law enforcement retirees. Pet.App.24a.

The circuit court summarized the rule of *Davis* as follows:

> [W]hen a state tax statute is alleged to violate the constitutional doctrine of intergovernmental tax immunity by favoring state employees over similarly situated federal employees, the proper inquiry is whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes.

Pet.App.22a. In this case, the circuit court concluded, no "significant differences" between Dawson and the

exempted state retirees justified the inconsistent tax treatment. Pet.App.22a-24a.

*First*, the circuit court recognized that "[i]t is undisputed in the present matter that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers listed in" § 12(c)(6). Pet.App.22a.

*Second*, the circuit court held that the State's proffered justification for the discriminatory tax treatment—"that the Legislature crafted [§ 12(c)(6)] specifically to benefit the narrow class of *state* law enforcement officers"—actually undercuts the State's case under *Davis*. Pet.App.23a. "This type of inconsistent tax treatment is ... unquestionably based on the source of one's retirement income and precisely the type of favoritism the doctrine of intergovernmental tax immunity prohibits." *Id.*

*Third*, the circuit court held that although federal retirees on average receive larger pensions than state retirees, that difference could not justify offering a full exemption to state retirees only. Pet.App.23a-24a. The circuit court emphasized that this Court "rejected this very notion in *Davis*," because "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits" but "on the basis of the amount of benefits received by individual retirees." Pet.App.24a (quoting *Davis*, 489 U.S. at 817). "Had the ... Legislature intended [§ 12(c)(6)] to account for differences in income instead of differences in the source of income, it easily could have do[ne] so." *Id.*

For these reasons, the circuit court concluded that the State's tax scheme "violates 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity by favoring retired state and local law enforcement officers over retired federal law enforcement officers." Pet.App.24a.

2. Declaring that it could "find[] no substantial question of law," the West Virginia Supreme Court of Appeals reversed. Pet.App.2a.

The court began by acknowledging what *Davis* held:

> [I]f a heavier tax burden is imposed upon a class of individuals who deal with the federal government than is imposed upon those individuals who deal with state government, then "the relevant inquiry is whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'"

Pet.App.8a (quoting *Davis*, 489 U.S. at 815-16). The court expressed no doubt that § 12(c)(6) imposes "inconsistent tax treatment." Pet.App.12a. And it identified no "significant differences" between the state and federal retirees that might justify that inconsistent treatment. Br. in Opp. 20 (conceding as much). Yet it nonetheless upheld the discriminatory tax scheme.

Rather than follow *Davis*, the court below adhered to its earlier decision in *Brown v. Mierke*, 443 S.E.2d 462 (W.Va. 1994), which rejected a challenge to § 12(c)(6) brought by federal *military* retirees. Pet.App.9a-10a. *Brown* distinguished *Davis* on the ground that it addressed a "blanket exemption" available "to *all* state retirees," whereas § 12(c)(6)

"exempts a *narrow* class of state employees from state taxation while taxing federal employees." Pet.App.10a (quoting *Brown*, 443 S.E.2d at 466). *Brown* further reasoned that § 12(c)(6) "differed from the 'schemes invalidated by the Supreme Court in that there is no intent in the West Virginia scheme to discriminate *against* federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees.'" Pet.App.10a (quoting *Brown*, 443 S.E.2d at 466).

In contrast to this Court's holding in *Davis*, *Brown* stated the law as follows:

> Challenges to a state tax scheme under 4 U.S.C. § 111 can succeed only when one purpose of the challenged scheme is shown to discriminate against the officer or employee because of the *source* of pay or compensation. In determining whether such discrimination exists, a court will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against employees or former employees of the federal government.

Pet.App.11a (quoting *Brown*, 443 S.E.2d at 463).

Applying this standard, the court below held that the Dawsons had failed to establish discriminatory intent in light of the following circumstances. Pet.App.15a.

*First*, the State gives slightly better tax treatment (a $2000 exemption) to federal retirees than it gives to *private-sector* retirees and retired state judges. Pet.App.15a & n.11.

*Second*, although the State discriminates in favor of the law enforcement retirees covered by § 12(c)(6), it

treats federal retirees like Dawson the same as most *other* state retirees (who also receive only the $2000 exemption). Pet.App.15a.

***Finally***, not all state "law enforcement officers ... are permitted to rely upon the Section 12(c)(6) exemption." Pet.App.15a-16a. That is because "[a]n unknown number of ... deputy sheriffs" receive their pensions from the general state employees' retirement fund and may take only the $2000 exemption. Pet.App.13a.

The court below concluded that "Section 12(c)(6) gives a benefit to a very narrow class of former state and local employees, and that benefit was not intended to discriminate against former federal marshals." Pet.App.16a. Following the intent-based standard it created in *Brown*, the court rejected the Dawsons' claim. *Id.*

## SUMMARY OF ARGUMENT

Section 111, which codifies the doctrine of intergovernmental tax immunity, says that a state tax on the pay of a federal employee must not "discriminate against the ... employee because of the source of the pay." 4 U.S.C. § 111(a). In *Davis*, this Court struck down a discriminatory Michigan tax scheme and established a bright-line rule for deciding whether a state's taxation of federal retirees violates § 111. Under that two-step analysis, a state violates § 111 if (1) it imposes "a heavier tax burden" on income from the federal government than on income from the state and (2) the inconsistent treatment is not "'justified by significant differences between the two classes.'" *Davis*, 489 U.S. at 815-16 (quoting *Phillips Chemical*, 361 U.S. at 383).

West Virginia's tax scheme is invalid under the *Davis* framework. At step one, the State plainly imposes a heavier tax burden on federal law enforcement retirees than on its own law enforcement retirees. At step two, the court below did not even attempt to point to any significant difference between federal and state law enforcement retirees that could justify the inconsistent tax treatment. Nor could it. It is undisputed that Dawson's job responsibilities were not significantly different from those of the favored state retirees. And although the State argued below that its discrimination is justified by the more generous benefits that federal retirees typically receive, *Davis* expressly rejected that very argument, holding that such differences could justify discrimination "on the basis of the amount of benefits received by individual retirees" but not "on the basis of the source of those benefits." 489 U.S. at 817.

The state court's contrary decision was wrong. First, the state court declined to apply the clear framework this Court adopted in *Davis*, asserting that the framework applies only to tax schemes that exempt *all* state retirees. But the rule set forth in *Davis* is categorical and, under that rule, § 12(c)(6) is plainly invalid. Next, with *Davis* out of the way, the state court declared that the relevant question is whether § 12(c)(6) was intended to benefit state employees or burden federal employees. But *Davis* forecloses that inquiry as well; a state's *interest* in discriminatory treatment, no matter how rational, is irrelevant to whether it has engaged in impermissible discrimination. Finally, the court below analyzed how federal retirees' tax treatment compared to that of *private-sector* retirees, and it relied on that

comparison to support its finding that § 12(c)(6) is nondiscriminatory. Once again, that reasoning contravenes *Davis*, which held that the proper comparison is between federal and state *public-sector* retirees, not private-sector retirees.

Because the State here taxes federal retirees more heavily than state retirees, and because no significant differences between the classes justify the inconsistent tax treatment, the State's tax scheme violates § 111.

This Court should reverse.

## ARGUMENT

### I. SECTION 111 PROHIBITS A STATE FROM TAXING FEDERAL RETIREES MORE THAN STATE RETIREES UNLESS "SIGNIFICANT DIFFERENCES" JUSTIFY THE INCONSISTENT TREATMENT.

Under § 111, a state tax on the pay of a federal employee must not "discriminate against the ... employee because of the source of the pay." 4 U.S.C. § 111(a). This clause of § 111 "is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at 813.

In a trilogy of cases beginning with *Davis*, this Court established that a state violates § 111 if (1) it imposes "a heavier tax burden" on income from the federal government than on income from the state and (2) the discrimination is not "justified by significant differences between the two classes." *Davis*, 489 U.S. at 815-16 (quoting *Phillips Chemical*, 361 U.S. at 383). In short, "the relevant inquiry is whether the inconsistent tax treatment is directly related to, and

justified by, 'significant differences between the two classes.'" *Id.* at 816 (quoting *Phillips Chemical*, 361 U.S. at 383).

1. *Davis* addressed a challenge to a Michigan law that "exempt[ed] from taxation all retirement benefits paid by the State or its political subdivisions, but levie[d] an income tax on retirement benefits paid by all other employers, including the Federal Government." *Id.* at 805. The plaintiff was a federal retiree who sued for the same exemption that state retirees received. *Id.* at 805-07.

At the first step of the analysis, the Court found it "undisputed" that Michigan imposed a heavier tax burden on federal retirees than on state retirees. *Id.* at 814. The Court acknowledged that federal retirees were treated no worse than *private-sector* retirees, but held that comparison irrelevant to the analysis. *Id.* at 815 n.4. Instead, the proper comparison was between federal and state public-sector retirees, because "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Id.* And Michigan's tax system plainly "discriminate[d] in favor of retired state employees and against retired federal employees." *Id.* at 814.

At the second step, Michigan argued that there were significant differences between federal and state retirees because it had a "rational reason" for its "preferential treatment" of state retirees: to advance its own "interest in hiring and retaining qualified civil servants through the inducement of a tax exemption for retirement benefits." *Id.* at 816. But the Court

held that the *intent* behind Michigan's tax scheme was "wholly beside the point," because it "d[id] nothing to demonstrate that there are significant differences between the two classes." *Id.* "The State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment." *Id.*

Asserting that "its retirement benefits [we]re significantly less munificent than those offered by the Federal Government," Michigan also pointed to the "substantial difference in the value of the retirement benefits paid" to state versus federal retirees. *Id.* But the Court rejected the notion that "this difference suffices to justify the type of blanket exemption" that Michigan offered, which covered state retirees and excluded federal retirees without regard to the amount of benefits that a given retiree received. *Id.* at 817. "A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the *source* of those benefits ...; rather, it would discriminate on the basis of the *amount* of benefits received by individual retirees." *Id.* (emphases added).

In short, neither the state's intention to benefit its own retirees (rather than to harm federal retirees) nor differences in the value of state and federal retirement benefits could justify a tax exemption available only to state retirees. The Court thus concluded that Michigan's tax scheme "violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees." *Id.*

Justice Stevens alone dissented. He would have treated § 111 not as a ban on discriminatory tax treatment of federal versus state employees, but as a narrow protection against a problem of political process: Because "the Federal Government has no voice in the policy decisions made by the several States," a tax imposed only on federal employees "could be escalated by a State so as to destroy the federal function performed by them." *Id.* at 819 & 820 n.2 (Stevens, J., dissenting). But as long as a tax affects a "significant group of state citizens," § 111 does not preclude a state from favoring its own employees. *Id.* at 820 n.2, 824. Since the state retirees favored by Michigan's tax scheme amounted to only "a small percentage of its residents," and the scheme drew "no distinction between the federal employees or retirees and the vast majority of voters in the State" (that is, private-sector workers), Justice Stevens would have upheld it. *Id.* at 821, 823.

Justice Stevens acknowledged the broad impact of the Court's contrary holding: "[A]t least 14 other States grant special tax exemptions for retirement income to state and local government employees that they do not grant to federal employees," making those exemptions invalid unless justified by significant differences between the two classes. *Id.* at 822. He specifically identified West Virginia's § 12(c)(6) as one of the exemptions presumptively invalidated by the Court's ruling. *Id.* at 822 n.3.

The majority squarely rejected Justice Stevens' approach. It declined to engage in a free-form totality-of-the-circumstances analysis to decide whether the number of voters subject to the same tax treatment as federal retirees was large enough to prevent excessive

taxation of federal benefits. *See id.* at 815 n.4. In the majority's view, it was insufficient for the state to treat federal retirees as well as private-sector retirees. *Id.* Rather, the majority hewed to its bright-line rule: "'[I]t does not seem too much to require that the State treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself.'" *Id.* (quoting *Phillips Chemical*, 361 U.S. at 385).

2. The Court again applied the *Davis* test in *Barker v. Kansas*, 503 U.S. 594 (1992). Kansas "taxe[d] the benefits received from the United States by military retirees but d[id] not tax the benefits received by retired state and local government employees." *Id.* at 596. The question was whether the state tax scheme was "inconsistent with 4 U.S.C. § 111." *Id.*

*Barker* began by outlining the *Davis* framework: Courts should "evaluate a state tax that is alleged to discriminate against federal employees in favor of state employees by inquiring 'whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes.'" *Id.* at 598 (quoting *Davis*, 489 U.S. at 816).

At the first step of the analysis, there was no dispute that military retirees were treated worse than state retirees. Kansas law extended a benefit to the latter that it withheld from the former. *Id.* at 596 n.1.

At the second step, Kansas could point to no "significant differences" between military and state retirees that justified the inconsistent tax treatment. Kansas argued that whereas state retirement benefits are deferred compensation for prior employment, military retirement benefits are best viewed as pay for current employment (because "[f]ederal military

retirees remain members of the armed forces ... after they retire from active duty"). *Id.* at 598. But the Court rejected the state's premise: "For purposes of 4 U.S.C. § 111, military retirement benefits are to be considered deferred pay for past services. In this respect they are not significantly different from the benefits paid to Kansas state and local government retirees." *Id.* at 605. Because no significant difference justified the inconsistent tax treatment, it violated § 111. *Id.*

Notably, the Court paid no attention to the fact that the Kansas exemption applied to most federal civilian retirees, *see id.* at 596 n.1, which might have been taken to indicate that Kansas bore no animus against the federal government. Nor did the Court suggest that the Kansas scheme reflected an *intent* to discriminate against the military. To the contrary (and consistent with *Davis*), the Court expressed no interest in the intent behind the discrimination.

Agreeing that "this case is controlled by *Davis*," Justice Stevens joined the unanimous opinion of the Court. *Id.* at 605 (Stevens, J., joined by Thomas, J., concurring). While accepting *Davis* as precedent, Justice Stevens reiterated his disagreement with it, asserting that "federal judges should not be able to claim a tax exemption simply because a State decides to give such a benefit to the members of its judiciary." *Id.* at 606. He concluded by noting that *Davis* was "subject to review and correction by Congress." *Id.*

Congress, however, has taken no action to "correct[]" *Davis*. Six years after *Barker* was decided, Congress amended § 111, adding two new subsections (which are not relevant here) and adding the title "General

Rule" to what is now § 111(a). *See* Pub. L. No. 105-261, 112 Stat. 2138-2139 (Oct. 17, 1998). The amendments made no change to § 111's nondiscrimination mandate.

3. The Court applied the *Davis* framework once more in *Jefferson County v. Acker*, 527 U.S. 423 (1999). In that case, federal district judges brought a § 111 challenge to an Alabama county's tax on the income of "persons working within the county who are not otherwise required to pay a license fee under state law." *Id.* at 427.

The Court rejected the challenge. "[B]y contrast" to the tax in *Davis*, Jefferson County did not tax federal and state employees differently; rather, "all State District and Circuit Court judges in Jefferson County and the three State Supreme Court justices who have satellite offices in the county" were subject to the same tax as federal judges. *Id.* at 443. Moreover, the "record show[ed] no discrimination ... between similarly situated federal and state employees" in the county's practice of granting exemptions, and the Court saw "no sound reason to deny Alabama counties the right to tax with an even hand the compensation of federal, state, and local officeholders." *Id.*

The Court warned, however, that "[s]hould Alabama or Jefferson County authorities take to exempting state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." *Id.*

* * *

In sum, in assessing compliance with § 111, this Court has repeatedly affirmed and applied the bright-line rule set forth in *Davis*. And it has clearly rejected the totality-of-the-circumstances approach suggested

in Justice Stevens' *Davis* dissent; the Court does not count up whether "enough" voters are treated the same as the federal retirees to ensure against excessive taxation of the federal retirees. The Court simply asks:

> (1) Does the state subject federal retirees to tax treatment that is less favorable than the tax treatment of state retirees?
>
> (2) If so, is the inconsistent tax treatment justified by significant differences between the two classes?

This test ascertains whether a heavier tax on federal retirees is based on the federal source of their income or some other, nondiscriminatory basis. If a state tax scheme fails the test, then it discriminates against the federal employees because of the source of their pay and thus violates § 111.

## II. WEST VIRGINIA TAXES FEDERAL LAW ENFORCEMENT RETIREES MORE THAN STATE LAW ENFORCEMENT RETIREES, DESPITE THE ABSENCE OF SIGNIFICANT DIFFERENCES.

Under a straightforward application of the two-step *Davis* test, the State's tax scheme violates § 111.

*First*, Dawson and other federal law enforcement retirees are taxed more heavily than state law enforcement retirees. Under § 12(c)(6), the State exempts from income tax *all* retirement benefits of the vast majority of state law enforcement retirees. W. Va. Code § 11-21-12(c)(6). By contrast, it exempts only "the first $2,000 of benefits received under any federal retirement system." *Id.* § 11-21-12(c)(5). Plainly, the State does not "treat those who deal with the [Federal]

Government as well as it treats those with whom it deals itself." *Davis*, 489 U.S. at 815 n.4.

*Second*, no "significant differences" between federal law enforcement retirees like Dawson and the state retirees who receive a full exemption justify this inconsistent tax treatment. "It is undisputed ... that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers." Pet.App.22a; *see also* Br. in Opp. i (question presented is whether the State must extend exemption to "federal retirees with job descriptions similar" to favored state retirees). And the court below identified no other significant differences. Br. in Opp. 20 (conceding as much).

Nor are there any other significant differences that might justify the inconsistent tax treatment. The state circuit court properly rejected West Virginia's argument that "the income differential between state and local law enforcement officers and their federal counterparts" could justify the discrimination. Pet.App.23a-24a. After all, *Davis* rejected that very argument in analogous circumstances: "A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as [the State's] statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." 489 U.S. at 817. Here, as in *Davis*, eligibility for a full exemption depends not on the amount of benefits received, but solely on whether the retiree receives the benefits from the favored state plans or from the federal government. W. Va. Code § 11-21-12(c)(5), (c)(6).

## III. THE DECISION BELOW CONTRAVENES *DAVIS*.

The court below upheld the State's discriminatory tax scheme on grounds that this Court expressly rejected in *Davis*. First, the state court followed its own precedent in *Brown*, which held that *Davis* applies only when a state offers favorable tax treatment to *all* state retirees—effectively limiting *Davis* to its facts. Second, it held that the dispositive question under § 111 is whether a state intends to discriminate *against* federal retirees or rather to extend a *benefit* to state retirees. But *Davis* squarely held that a state's "interest" in discriminating—even an apparently benign interest like benefiting its own retirees—is "simply irrelevant" under § 111. 489 U.S. at 816. Finally, the state court relied on the fact that the State treats federal retirees better than *private-sector* retirees. Yet *Davis* rejected precisely that argument, making clear that a state's tax treatment of private-sector retirees plays no role in the § 111 analysis. 489 U.S. at 815 n.4.

### A. *Davis* Does Not Turn On Whether A State Discriminates In Favor Of All Of Its Employees Or Only Some Of Them.

In upholding the State's inconsistent tax treatment, the court below followed its own decision in *Brown* rather than this Court's decision in *Davis*. In *Brown*, the court below acknowledged that *Davis* "would appear to call into question" § 12(c)(6)'s discriminatory exemption. 443 S.E.2d at 466. But it reasoned that *Davis* was not "controlling" because it involved a "blanket" tax exemption—which the state court understood to mean that the exemption was available

to *all* state retirees. *Id.* at 465. Because § 12(c)(6) instead offers an exemption only to *some* state retirees, the court below refused to apply *Davis*. *Id.* at 465, 467. The court below misunderstood both this Court's use of the term "blanket exemption" and the irrelevance under *Davis* of how many state retirees the state chooses to give preferential treatment.

1. *Davis* used the term "blanket exemption" only once, in the course of rejecting Michigan's argument that the difference in average income between federal and state retirees justified its discriminatory tax scheme. 489 U.S. at 817. The Court said:

> Even assuming the State's estimate of the relative value of state and federal retirement benefits is generally correct, we do not believe this difference suffices to justify the type of blanket exemption at issue in this case. While the average retired federal civil servant receives a larger pension than his state counterpart, there are undoubtedly many individual instances in which the opposite holds true. A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees.

*Id.*

In context, the Court used the phrase "blanket exemption" to describe an exemption that applied to state retirees and excluded federal retirees *without regard to income*. That is, the exemption applied to state retirees (and not to federal retirees) at *all* income

levels, even though there were "undoubtedly many individual instances" of federal retirees with lower income than state retirees. *Id.* Because it was a "blanket" exemption in the sense of disregarding differences in income, it could not be justified by reference to such differences.

In contrast, it was irrelevant to the Court's analysis whether the class of individuals who received the exemption consisted of all state retirees or just a subset of them—such as, for example, state law enforcement retirees. In either case, the exemption would be available to state retirees (and not federal retirees) regardless of an individual retiree's income level. And so in either case, the outcome would be the same: Differences in *amount* of income could not justify a tax scheme that discriminates based on the *source* of the income. *Id.*

There is thus no reason to understand "blanket exemption" to refer to the inconsequential fact that the exemption applied to "all" state retirees. Rather, in context, a "blanket exemption" is one that is available to its beneficiaries regardless of income level. Indeed, even the exemption in *Davis* was not a "blanket exemption" in the sense of applying to everyone "with whom [the state] deals itself," *id.* at 815 n.4—it did not apply to everyone who received income from the state, but only to *retired* state employees.

As this Court used the term, this case involves a "blanket" exemption just as much as *Davis* did: The benefits of all state retirees enrolled in the specified pension plans are exempt from taxation regardless of income level. *Davis* cannot be distinguished on this basis.

2. To the extent that the state court's decision was premised not on *Davis*'s use of the phrase "blanket exemption," but on the mere happenstance that the particular tax scheme under review there applied to all state retirees, the court again misconstrued *Davis*. Nothing in *Davis* turned on that detail.

As for the two-step framework the Court adopted, neither the majority nor the dissent ever suggested any limit to its applicability. The Court's holding was categorical: "Under our precedents, 'the imposition of a heavier tax burden on [federal retirees] than is imposed on [state retirees] must be justified by significant differences between the two classes.'" *Id.* at 815-16 (quoting *Phillips Chemical*, 361 U.S. at 383). In other words, *Davis* established the analytical framework for *all* § 111 litigation. *See id.*

Like that analytical framework, the result in *Davis* was also untethered to the fact that the exemption there applied to all state retirees rather than just some of them. At the first step of the analysis, the Court found that the federal retirees were treated worse than state retirees because everyone in the latter group received an exemption that was unavailable to the former. *Id.* at 814. But nothing in *Davis* suggests that the outcome would have been different if only *some* state retirees could claim the exemption. Rather, as long as *any* state retirees were treated better than federal retirees, the differential treatment might have been based on source of income, and thus the analysis would have to proceed to consider whether "significant differences" demonstrated that the distinction was based on some other factor.

At the second step of its analysis, the *Davis* Court found that no significant differences justified Michigan's tax scheme. As discussed above, the Court dismissed Michigan's argument that the difference in average income between state and federal employees justified the unequal tax treatment. 489 U.S. at 816. And there is no basis to conclude that the Court would have reached a different conclusion if Michigan had offered an exemption only to a subset of state retirees. *Id.*

Indeed, Justice Stevens specifically objected to this aspect of *Davis*. In dissent, he wrote: "The obligation of a federal judge to pay the same tax that is imposed on the income of similarly situated citizens in the State should not be affected by the fact that the State might choose to grant an exemption to a few of its taxpayers—whether they be state judges, other state employees, or perhaps a select group of private citizens." *Davis*, 489 U.S. at 821-22 (Stevens, J., dissenting). And he reiterated that point in *Barker*: "federal judges should not be able to claim a tax exemption simply because a State decides to give such a benefit to the members of its judiciary." 503 U.S. at 606 (Stevens, J., concurring). In other words, Justice Stevens recognized that the Court would find a violation of § 111 when even a *subset* of state employees was treated better than federal employees in the absence of significant differences. The Court rejected Justice Stevens' view, but it never questioned his understanding of its rulings.

Similarly, the Court in *Jefferson County* concluded that, while the challenged tax scheme was lawful because "[t]he record show[ed] no discrimination ... between similarly situated federal and state

employees," if the county were to "exempt[] state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." 527 U.S. at 443. The Court's statement makes clear that the county would violate § 111 by exempting just some of its employees while denying the same exemption to "similarly situated" federal workers. Section 12(c)(6) does precisely that.

3. Limiting *Davis* to only those tax policies that discriminate in favor of *all* state retirees would also lead to absurd results. On that logic, Michigan could have cured the violation in *Davis* simply by taking its favorable tax treatment away from one unlucky state retiree, while continuing to treat every other state retiree better than all federal retirees. Or Michigan could have denied the exemption to just a defined subset of state retirees (perhaps, as here, participants in particular state pension plans). Extending preferential treatment to the other state retirees but none of the federal retirees would obviously discriminate based on source of income—just as a law exempting tall men while taxing both women and short men would discriminate based on sex. Yet, on the state court's reasoning, these hypothetical tax schemes would survive review. Alternatively, Michigan could have circumvented *Davis* by creating narrow exemptions for many groups of state retirees (one for police, one for firemen, one for teachers, and so on) that would add up to something very similar to an exemption for all state retirees. That is obviously wrong, and *Davis* appropriately prevents such unfair and arbitrary results. The state court's analysis invites them.

### B. The Intent Behind A Discriminatory Tax Scheme Is Irrelevant.

Instead of applying *Davis*, the court below applied the flawed framework it created in *Brown*: "[I]n determining whether [§ 111] discrimination exists, this Court 'will look to the totality of the circumstances to ascertain whether the *intent* of the scheme is to discriminate against employees or former employees of the federal government.'" Pet.App.14a-15a (quoting *Brown*, 443 S.E.2d at 463). Using that framework, the court below upheld the tax scheme as nondiscriminatory, because the "intent" of the scheme was "to give[] a *benefit* to a very narrow class of state retirees," not to "discriminate *against* former federal marshals." Pet.App.16a (emphases added). *Davis*, however, specifically rejected this sort of reasoning.

*Davis* held that a state's reason for imposing a discriminatory tax is "wholly beside the point." 489 U.S. at 816. Michigan had claimed a motive that was nearly identical to the one the state court attributed to West Virginia here. According to Michigan, it exempted state retirement benefits so that it could "hir[e] and retain[] qualified civil servants through the inducement of a tax exemption for retirement benefits." *Id.* In other words, it wanted to offer a *benefit* to state employees in order to attract higher quality workers. It had no animus toward federal retirees, and no intent to burden, or discriminate *against*, them. But this Court was unequivocal: "The State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant." *Davis*, 489 U.S. at 816.

The state court's contrary holding would render § 111 a dead letter. If a state could avoid "discrimination" simply by aiming to *benefit* some favored group of taxpayers (or itself), it could get around the statute through mere wordplay. Every discriminatory tax scheme creates winners and losers, and thus a state can *always* cast its tax as motivated by an intent to *benefit* the winners rather than discriminate *against* the losers. Perhaps that is why the state court never explained just what *would*, in its view, constitute an impermissible "intent ... to discriminate." Pet.App.11a (quoting *Brown*, 443 S.E.2d at 463).

Of course, states are free to offer financial inducements to attract and retain qualified employees. Nothing prevents a state from simply raising its employees' pay or retirement benefits to whatever level it deems best. But "to provide the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of a tax exemption, the State would have to increase its outlays by more than the cost of the current tax exemption, since the increased payments to retirees would result in higher federal income tax payments in some circumstances." *Davis*, 489 U.S. at 815 n.4. That is why states might seek to compensate their employees through discriminatory tax exemptions rather than by simply paying them more. It is also one reason why § 111 prohibits them from doing so: "Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar." *Id.*

### C. A State's Treatment Of Private-Sector Retirees Is Irrelevant.

The court below relied on the fact that federal retirees "receive[] more favorable treatment" than *private-sector* retirees. Pet.App.15a (referring to a $2000 exemption for public employees' retirement benefits). But *Davis* makes clear that a state's treatment of private-sector retirees is irrelevant to the § 111 analysis, which simply asks whether "the imposition of a heavier tax burden on those who deal with one sovereign than is imposed on those who deal with the other" is "justified by significant differences between the two classes." 489 U.S. at 815-16 (quoting *Phillips Chemical*, 361 U.S. at 383). Private-sector retirees, who "deal with" *neither* sovereign, have no role to play in this framework. *Id.* at 815 n.4.

Indeed, the state court's reasoning mirrors Justice Stevens' argument in his *Davis* dissent that the Michigan tax scheme was nondiscriminatory because it "dr[ew] no distinction between the federal employees or retirees and the vast majority of voters in the State." 489 U.S. at 823 (Stevens, J., dissenting). Justice Stevens considered Michigan's tax scheme unobjectionable because it "applie[d] to approximately 4½ million individual taxpayers in the State, including the 24,000 retired federal employees," and "exempt[ed] only the 130,000 retired state employees." *Id.* at 821. He thus faulted the Court for focusing exclusively on "whether the tax treatment of federal employees is equal to that of one discrete group of Michigan residents—retired state employees." *Id.* Because the large population of private-sector retirees subject to taxation was an adequate "political check" against

excessive taxation of federal benefits, Justice Stevens found no problem under § 111.

The majority expressly rejected this logic. *Id.* at 815 n.4. It observed that *Phillips Chemical* had invalidated a scheme that taxed lessees of federal property more heavily than lessees of state property, even though there was "no discrimination between the [Federal] Government's lessees and lessees of private property." *Id.* (quoting *Phillips Chemical*, 361 U.S. at 381). And that reasoning was "consistent with the underlying rationale for the doctrine of intergovernmental tax immunity," because "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Id.* The *Davis* majority drew a bright line: "[I]t does not seem too much to require that the State treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself." *Id.* (quoting *Phillips Chemical*, 361 U.S. at 385).

Because it offers a "unique tax exemption," Pet.App.3a, solely to law enforcement retirees "with whom it deals itself" and not to federal law enforcement retirees, *Davis*, 489 U.S. at 815 n.4, the State's tax scheme contravenes *Davis*. The court below was wrong to conclude otherwise.

### D. Unlike This Court's Bright-Line Rule, The State Court's Totality-Of-The-Circumstances Analysis Is Unworkable.

As discussed above, *Davis* establishes a straightforward two-part test. By contrast, according

to the court below, a state violates § 111 only if its "intent" is to discriminate against federal retirees (rather than in favor of state retirees), and courts must discern the state's intent from the "totality of the circumstances." Pet.App.11a.

The state court's framework is unworkable. In determining that § 12(c)(6) was nondiscriminatory, the court found it relevant that Dawson received "more favorable tax treatment than state civilian retirees" and "retired state justices and circuit judges." Pet.App.15a. It also relied on the fact that Dawson received the same tax treatment as the "vast majority" of state retirees. *Id.* But it provided no guidance as to the proper outcome under slightly different facts. What would be the result, for example, if 80% of state retirees were treated like Dawson? Or 70%? Are such majorities sufficiently "vast" to suggest compliance with § 111? What if only a bare majority of state retirees received the same tax treatment as Dawson? And what if private and judicial retirees were merely treated the same as Dawson rather than worse than him? Would the answer change if a minority of private-sector retirees were treated better? What if only a small subset of federal retirees were subject to the heaviest tax burden? Or if all federal retirees were targeted for unfavorable tax treatment, but the legislature's undisputed and documented intent was to generate tax revenue to *benefit* state retirees? The state court's test would raise each of these unanswerable questions, whereas the bright-line rule this Court drew in *Davis* avoids them.

Under an amorphous test like the one applied below, states could not predict whether their tax schemes were legal, and the 2.6 million Americans receiving

federal retirement benefits could not determine whether they were being treated unlawfully. *See, e.g.*, *Wos v. E.M.A.*, 568 U.S. 627, 653 (2013) (Roberts, C.J., dissenting) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)) (discussing the "obvious and familiar" "reasons for drawing a bright line"); U.S. Office of Personnel Management, Statistical Abstracts Fiscal Year 2017: Federal Employee Benefit Programs 21-22 (Jan. 2018). In the words of Chief Justice Marshall, courts would be "driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." *McCulloch*, 17 U.S. (4 Wheat.) at 430.

## CONCLUSION

The judgment of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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AUGUST 28, 2018